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In the
Supreme Court of the United States

OCTOBER TERM 1950

No. 390

N. J. ALLBAUGH, also known as NORMAN J. ALLBAUGH, FRANK VESELY, W. E. ALLBAUGH, also known as WILBER ALLBAUGH, FRANK J. VESELY, also known as F. J. VESELY, and REUBEN VESELY,

Petitioners and Appellants below,

v.

UNITED STATES OF AMERICA,

Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

———o———

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

SUMMARY STATEMENT OF MATTER INVOLVED

The Facts

The Omaha and Winnebago Indian reservations are located in Thurston County, Nebraska. Restricted trust

patents were issued to Indian allottees pursuant to the General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. A., Sec. 331, et seq. Being Indian trust lands the allotments were immune from taxes during the trust period and any extension thereof. Indian allottees were authorized to lease said lands by the Act of March 3, 1921, 41 Stat. 1225, 1232, 25 U. S. C. A., Sec. 393 (R. 137).

In 1916 Congress passed the Brown-Stephens Act, 39 Stat. 865, printed in full as Appendix, to subject these allotments to a limited form of taxation. The lands are to be appraised and assessed for taxation, but are not subject to levy and tax sale. If taxes so assessed are not paid within one year, the county treasurer shall certify the fact to the Secretary of the Interior who, if he has Indian funds arising from the lands, may pay the tax therefrom. If the Secretary has no such funds, he shall certify the fact back to the county treasurer, which certification is a full release and discharge of the tax.

The petitioners leased the lands and promised to pay the taxes to the county treasurer. Petitioners did not pay the taxes. The county treasurer did not certify the delinquent taxes to the Secretary of the Interior. The Secretary of the Interior did not certify "no funds" back to the county treasurer.

The Action

The action is brought by the United States as plaintiff claiming against petitioners certain sums as real estate taxes assessed and levied against allotted restricted Indian lands in Thurston County, Nebraska. Petitioners are lessees and bondsmen for lessees of the lands in-

volved. None of the taxes have been paid by any party to the action or by any one else (R. 25).

Over 100 separate suits were filed. The instant case is No. 1 in the District Court and was presented on the pleadings and stipulation of facts (R. 24 and 77 and 128). By stipulation all pleadings and evidence filed in case No. 1 are considered filed in all of the cases and the final judgment entered in case No. 1 shall be, except for variations in amounts, the judgment in all of the cases (R. 77).

Claims of United States

United States brought the action in its capacity as sovereign trustee *for and on behalf of the Indian owners* of the tract of land involved (R. 1). It alleged that petitioners hold the unpaid taxes *for the use and benefit of the Indian owners* (R. 3). The theory of the Complaint is that the petitioners owe a debt, viz., the amount of the unpaid taxes, to the Indian owners and the United States sues to collect the amount for the use and benefit of the Indian owner (R. 1 to 20).

Defenses Presented

Petitioners presented these defenses (R. 20 to 23):

1. They have paid in full all rents and sums due the Indians as agreed upon in the written lease contracts.

2. The taxes claimed are not a lien or incumbrance upon the lands in suit.

3. Neither the United States nor the Indians have paid any of the taxes nor are they obligated to pay same.

4. Petitioners did not agree to pay any tax sums to the United States or its Indian wards.

5. Neither United States nor its wards have a legal right in said sums or a right to receive payment thereof.

6. If the taxes are due and owing to anyone, they are due and owing to Thurston County, Nebraska, but neither the County nor its Treasurer are party to the suit and no claim is presented for their use and benefit.

7. The exclusive remedy for collection of the taxes prescribed in the Brown-Stephens Act has not been followed and the Court is, therefore, without jurisdiction.

8. Under the Treaty and the Trust patent the land is immune from taxation.

—o—

THE DECISION

The decision below is *Allbaugh v. United States,* 184 F. 2d 109 (R. 136-150). The Court failed to sustain the defenses tendered and affirmed the judgment of the District Court for the United States (R. 119 to 125; R. 136 to 151). It will be noted that the Court of Appeals added to the judgment of the District Court a direction (R. 151) that proceeds collected be paid to the Treasurer of Thurston County, Nebraska.

—o—

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 of U. S. C. A.

—o—

QUESTIONS PRESENTED

1. Does the lease agreement for payment of taxes to Thurston County give the Indian lessor, or the United States, a right to sue and recover in an action of debt?

2. May the United States prosecute the action when the real party in interest is, as shown by the decision, Thurston County, Nebraska?

3. Is the administrative method prescribed by the Brown-Stephens Act for collection of the taxes, exclusive?

4. May Indian trust allotments be subjected to any form of taxation?

———o———

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Brown-Stephens Act has not heretofore been before this Court. The question of enforcing collection, or securing discharge of taxes assessed under the Act, viz., judicially or administratively, should be settled by this Court.

2. The decision of the court below, in permitting recovery by one not the real party in interest, is in conflict with applicable decisions of this Court.

3. The court below, in permitting recovery by Thurston County, not the real party in interest and not a party to the action, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Wherefore your petitioners pray that a writ of certiorari issue directed to the Circuit Court of Appeals for

the Eighth Circuit commanding said court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 13967, N. J. Allbaugh, et al., Appellants, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated October 28, 1950.

N. J. Allbaugh, et al.,

by George M. Tunison,

Counsel for Petitioners.

Richard C. Peck,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion in the Circuit Court of Appeals is in the printed record, beginning at page 136. The opinion is published, *Allbaugh v. United States,* 184 F. 2d 109.

JURISDICTION

1. The date of the judgment sought to be reviewed is August 9, 1950 (R. 150).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is par. (1) of Sec. 1254 of Title 28 of U. S. C. A.

STATEMENT OF THE CASE

The case is stated in the preceding petition under the heading, Summary Statement of Matter Involved (pp. 1-4), which Statement is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

1. The court below erred in holding that the United States could prosecute the action when neither it nor its Indian wards are the real party in interest entitled to the avails of the suit.

Rule 17 (a), Federal Rules Civil Procedure.

Rule 8 (a) 2, Federal Rules Civil Procedure.

United States v. Beebe, 127 U. S. 338, 32 L. ed. 121.

McWhirter v. Otis Elevator Co., 40 F. Supp. 11.

D. L. Stern Agency v. Mutual Benefit Health & Accident Assn., 43 F. Supp. 167.

Secs. 25-301 and 304, Revised Statutes of Nebraska, 1943.

Uptegrove v. Metropolitan Life Insurance Co., 145 Neb. 51, 15 N. W. 2d 220.

39 Am. Jur., Parties, Sec. 16.

17 C. J. S., Contracts, Sec. 518, b.

2. The court below erred in holding that the taxes in suit are rent and created a debt which the United States may recover for and on behalf of the Indian lessors.

Lamoine Mott Estate v. Neiman, 77 F. 2d 744.

Miles Corporation v. Lindel, 107 F. 2d 729.

51 C. J. S., Landlord and Tenant, par. 360 (a), pp. 1054 and 1068.

In re Associated Trust Hotels, 228 F. 767.

Block v. City of West Palm Beach, 112 F. 2d 949.

3. The court below erred in failing to sustain the defense that the method prescribed by the Brown-Stephens Act for collection and discharge of the taxes is exclusive.

1 Corpus Juris, Actions, Sec. 102.

Bruce's Juices v. American Can Co., 330 U. S. 743, 755; 91 L. ed. 1219, 1228.

Bowles v. Warner Holding Co., 151 F. 2d 529.

Progressive Miners of America v. Peabody Coal Co., 7 F. Supp. 340.

Stanley, et al. v. Peabody Coal Co., 5 F. Supp. 612.

Carmody v. L. L. Coryell Oil Co., 133 Neb. 661, 276 N. W. 383.

Brown-Stephens Act, 39 Stat. 865, Sec. 2.

4. The court below erred in failing to hold that the Indian trust lands are immune from taxation.

25 U. S. C. A. 348.

Choate v. Trapp, 224 U. S. 665; 56 L. ed. 941.

Glacier County, Montana v. United States, 99 F. 2d 733.

United States v. Nez Perce County, Idaho, 95 F. 2d 232.

United States v. Board of Commissioners of Fremont County, Wyoming, 145 F. 2d 329.

ARGUMENT

Summary of the Argument

Point A. The complaint alleged that the action is brought by the United States for the Indian land owners and that petitioners wrongfully hold the unpaid taxes as trustee for the use and benefit of the Indian owners. The facts and the decision demonstrate the error of such allegation and prove that the action was really prosecuted for the use and benefit of Thurston County, Nebraska.

Point B. Defenses which petitioners could have successfully urged against a suit for the use and benefit of

Thurston County were precluded under the allegations of the complaint.

Point C. Neither the United States nor its Indian wards are entitled to the avails of the suit. Hence it was not prosecuted by the real party in interest.

Point D. The taxes in suit were not rent and were not a lien. No damage resulted to the United States or the Indians from petitioners' failure to pay.

Point E. Indian trust lands are immune from any form of taxation.

Summary of Evidence

The entire evidence is contained in agreed stipulations of facts together with exhibits attached thereto (R. 24 to 80). The evidence fairly summarized is:

1. The lands are held by the United States as trustee under restricted trust patents issued to Indian allottees (R. 24).

2. The lands were subjected to taxation by the State of Nebraska pursuant to provisions of the Brown-Stephens Act. The taxes are not a lien upon the lands (R. 25).

3. The Superintendent advertised the lands for lease on the following terms (R. 73, 75):

a. Bids to be made for cash or bushels per acre.

b. Taxes to be paid by the lessee to the County Treasurer; receipts therefor to be filed in the agency office.

c. Lessees whose rentals are delinquent will not be entitled to preference rights for renewals of leases.

4. Leases were made on the following terms (R. 29, 35, 39, 45, 49, 53, 59, 65, 69):

a. Cash or bushels per acre "plus taxes."

b. Taxes to be paid to the County Treasurer; receipts therefor to be filed in the agency office.

c. Rentals not paid when due will draw interest.

5. The Superintendent recorded on the rental records (R. 33, 37, 43, 47, 51, 57, 63, 67):

a. Payments of cash or bushels per acre due and payments made.

b. Interest due on payments due of cash or bushels per acre and interest paid.

6. The Superintendent did not consider taxes when making entries on rental records to show rentals due and rentals paid (R. 25).

7. The Superintendent did not consider nonpayment of taxes as being delinquency in rental payments when charging interest for delinquent rentals as provided in the lease contract (R. 25).

8. The Superintendent did not consider nonpayment of taxes as delinquency in rental payments when renewing the lease (R. 29, 35, 39, 45, 49, 53, 59, 65, 69).

———o———

GENERAL ARGUMENT

The facts, the claims, the defenses, the errors specified and the points of argument will now be considered in what is believed to be logical order.

The Brown-Stephens Act

It will be agreed that the act is an effort to raise funds for Thurston County, Nebraska, which contains a large acreage of allotted Indian lands, held in trust by the United States. The lands are to be *appraised* and *assessed* for taxation as provided by the laws of Nebraska. But there the laws of Nebraska stop. Congress was unwilling to attempt to subject the lands to any lien or levy or tax sale as provided by the laws of Nebraska for collection of taxes. It is elementary that the "bite" in all real estate taxation is that the tax is a lien and if not paid the taxing authority can sell the land. The Act provides:

> "if such tax shall not be paid within one year after the same shall become due and payable, as provided by the laws of the State of Nebraska, then the list of such unpaid and delinquent taxes on the lands of the Winnebago Indians and Omaha Indians, as above provided, shall be certified by the county treasurer of the county in which such lands are situated to the Secretary of the Interior, who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof or under his control; and in the event that no such funds shall be in the possession or under the control of the Secretary of the Interior, he shall certify that fact to the said county treasurer, which certificate shall operate as a full release and discharge of the tax assessed against the land of the Indian so without funds."

The Act worked satisfactorily for a number of years and now is working satisfactorily. It will be noted the taxes sued upon are for the years 1934 to 1942, inclusive, 9 years (R. 2 to 18). The Act was passed in 1916 and the suit was filed in 1946. So for 21 of the 30 years from

1916 to 1946 no complaint appears. The county treasurer and the Indian agent presumably did their respective duties. The Court will take judicial notice of the state of agriculture in the Missouri valley during the years following 1933. The great agricultural states of Nebraska and Iowa are separated only by the Missouri River. Thurston County, Nebraska extends 30 miles west from the river. Page County, Iowa lies approximately the same distance east of the river. The recent decision in *American National Bank v. United States*, 92 F. Supp. 403 (June 30, 1950) paints the picture. The bank at Braddyville, Page County, Iowa, closed its doors December 1, 1933. The court said, p. 416:

> "hundreds of banks were in process of liquidation during that period. Throughout the farming area, which included Braddyville, Iowa, the casualties among banks were probably proportionately greater than in any other section of the country, because of the tremendous inflationary values upon which their assets and securities had been based in prior years.
>
> "The court may take judicial notice of the historical fact that prior to 1936, crop failures had been pretty general throughout this section of the country; that the farmers had for a number of years, been in the lowest economic state ever known to agriculture in the United States within the memory of the generation, so, under such economic conditions, the court must determine whether notes given by farmers who had suffered from this unusual and unprecedented condition, had any determinable market value."

So the Thurston County lessees did not pay the taxes they had agreed to pay. The county treasurer did not certify the list of unpaid taxes to the Secretary of the Interior or to his local representative, the Indian agent (R. 26, Par. 9). The Secretary paid no taxes from Indian

funds or otherwise and made no certification back to the treasurer (R. 26). The Secretary went right along leasing the lands to the same lessees who had not paid the taxes and collected, as best he could, the stipulated rental payments, in cash or share crop. (Note. References herein to The Secretary of the Interior, usually refer to the local Indian agent, usually designated Superintendent, who handles the field work for the Secretary.)

Since 1942 no tax delinquencies appear and it is a fair inference that the Brown-Stephens Act is being administratively executed, the same as prior to 1934. The procedure is simple. All the Superintendent has to do when approving the lease is to require the prospective lessee to produce the county treasurer's receipt for the taxes. Clearly from the Act itself it was the intention of Congress that the whole experiment in limited taxation be handled administratively. The procedure to discharge unpaid taxes is simple. The method to avoid delinquencies is equally simple. The Act contains no provision for legal action to collect the taxes. Yet suddenly, out of a clear sky, in October 1946 the United States files this suit and over 100 other suits for taxes as far back as 1934, twelve years.

Specification of Error I.

The court below erred in holding that the United States could prosecute the action when neither it nor its Indian wards are the real party in interest entitled to the avails of the suit.

Discussion of the above specification includes Points A, B and C of the Summary of Argument.

Authorities

Rule 17(a), Federal Rules Civil Procedure, 28 U. S. C. A.:

> "Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought;"

In *United States v. Beebe*, 127 U. S. 338, 32 L. ed. 121, the court said:

> "It has not been unusual for this court, for the purposes of justice, to determine the real parties to a suit by reference not merely to the names in which it is brought, but to the facts of the case as they appear on the record."

McWhirter v. Otis Elevator Co., 40 F. Supp. 11:

> "Subsection (a) is mandatory and must be liberally construed to effectuate its purpose. * * * Under rule 17(a) defendant has the right to require that the action against him, if not in the name of a plaintiff within one of the express exceptions, shall be brought in the name of the real party in interest *so that he can avail himself of the defenses which he has against the real party in interest*, and so that his payment to plaintiff on plaintiff's recovery will fully protect him in the event of another action upon the same cause." (Emphasis supplied.)

D. L. Stern Agency v. Mutual Benefit Health and Accident Ass'n, 43 F. Supp. 167:

> "Under Federal Rules of Civil Procedure, Rule 17(a), every action must be presented in the name of the real party in interest. As paraphrased by Moore

(2 Moore's Federal Practice, p. 2042) this means: 'An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced.' "

Revised Statutes of Nebraska, 1943:

Sec. 25-301. "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304."

Sec. 25-304. "An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted."

Uptegrove v. Metropolitan Life Insurance Co., 145 Neb. 51, 15 N. W. 2d 220:

"By virtue of Section 20-301, Comp. St. 1929 (R. S. 1943, 25-301) 'Every action must be prosecuted in the name of the real party in interest,' * * *. In giving effect to this section we have held that *the real party in interest is the person entitled to the avails of the suit.*" (Italics supplied.)

39 Am. Jur., Parties:

"Sec. 16. *Real Party in Interest Statutes.*—In most, if not all, jurisdictions, either by statute or by rule of practice, all actions, whether at law or in equity, are, with certain exceptions, required to be prosecuted in the name of the real party in interest."

17 C. J. S., Contracts, Sec. 518, b:

"It is now provided by statute in many jurisdictions that actions shall be brought in the names of the real parties in interest, the real party in interest being the beneficial owner, or the person legally entitled to the proceeds or benefits of the claim in litigation."

The foregoing list of authorities can be expanded indefinitely. Of course the United States, under the second clause of Rule 17 (a), in a proper factual situation, can maintain an action for its Indian wards. But proper facts are not here. The complaint alleges (R. 1, Pars. 1 and 3):

> "This action is brought by plaintiff as Trustee for and on behalf of the Indian owners of the tract of land involved" and
>
> "This action is instituted by plaintiff as such sovereign Trustee for and on behalf of the owners of the various allotments and *for their use and benefit.*" (Emphasis supplied.)

and (R. 3, Par. 6) the petitioner holds the sum of unpaid taxes:

> "as trustee for the use and benefit of said Indian owners in whose behalf the plaintiff has brought this suit."

There is not a scintilla of evidence in the record or in the Brown-Stephens Act to show that the Indian ward is entitled to the tax sums or has any interest therein.

Thurston County Is Real Third Party Beneficiary.

Under the law it is the duty of United States to establish by evidence an obligation on the part of defendants, petitioners, to pay the tax sums to plaintiff or its wards. Otherwise no right of recovery can exist. This duty has not been performed.

Granted that a breach of contract is shown namely; defendants did not pay the taxes, which the Indian lessors were not obligated to pay and in fact did not pay; yet, under the law and the evidence, plaintiff has not shown any amount due to plaintiff or its wards. And plaintiff

has not sued for the benefit of Thurston County, the third party beneficiary of these contracts.

The promise of defendants was not to pay the taxes to plaintiff or its wards, but it was to pay them to Thurston County, Nebraska.

Neither plaintiff nor its wards show damage by reason of the nonpayment of these sums to the beneficiary of the promise, Thurston County, for the lands are not subject to execution and sale for delinquent taxes and neither plaintiff nor its wards have themselves paid the taxes.

Plaintiff, therefore, has not established a legal right to judgment for one cent of the amounts claimed.

If any doubt existed as to who is the real party in interest it is settled by the decision of the Court of Appeals directing the avails of the action to be paid to Thurston County (R. 151).

It is believed that no instance will be found in the books where such procedure, contrary to law and rules of court, has been attempted. It is evident that had Thurston County brought this suit, or had the United States alleged that it brought the suit for the use and benefit of Thurston County, they would at once have been met with the valid defense that Thurston County had not followed the procedure specified in the Brown-Stephens Act. They would have been met with other complete defenses. As stated in headnote 2 of United States v. Beebe, 127 U. S. 338, 32 L. ed. 121:

> "In cases where the Government, although a nominal plaintiff, has no real interest in the litigation, but has allowed its name to be used therein for the

sole benefit of a private person, the defenses of laches and the Statute of Limitations are available, the same as in suits between private individuals."

The defense that the action cannot be maintained because neither the United States nor its Indian wards are the real party in interest, entitled to the avails, was urged in the trial court by Motion to Dismiss. That defense was carefully preserved in the Answer (R. 21-22), Third Defense, as follows:

THIRD DEFENSE

"1. The defendant Allbaugh has paid in full to plaintiff or its wards all rents and sums of money which were stipulated and agreed upon by the parties in written contract to be due and payable to plaintiff and its wards in consideration for the letting of the described lands to the defendant Allbaugh.

"2. Plaintiff's claims are for taxes levied and assessed upon the lands described in the complaint by officials of the governmental subdivisions of the State of Nebraska acting pursuant to provisions of the Brown-Stephens Act, Public Law No. 291, December 30, 1916 (39 Stat. 865). Said Act exempts the described lands from levy and tax sale as provided under laws of the State of Nebraska for the collection of taxes, and provides for full release and discharge of all taxes assessed if not paid. Further, neither plaintiff nor its wards are obligated or indebted to pay the alleged sums of taxes, nor have they paid said taxes, nor can the governmental subdivisions of the State of Nebraska proceed against plaintiff or its wards with forced collection of said taxes, nor do said taxes constitute an incumbrance, charge or lien upon said lands.

"3. By the terms of written lease contracts alleged by plaintiff in the complaint, defendant All-

baugh agreed to pay all sums of taxes to the Treasurer of Thurston County, Nebraska, and did not agree to pay any tax sums to plaintiff or its wards; and neither plaintiff nor its wards have a legal right in said sums nor a right to receive payment thereof.

"4. If defendants are indebted for the sum of taxes alleged in the complaint, they are indebted to the Treasurer of Thurston County, Nebraska, for the benefit of the various governmental subdivisions of the State of Nebraska; but said Treasurer of Thurston County, Nebraska, though a resident of this District and subject to the jurisdiction of this Court as to both service of process and venue, has not been made a party to this action, nor is this action brought for the benefit of said Treasurer of said County or for the benefit of the various governmental subdivisions of the State of Nebraska."

The evidence in the record amply supports the factual matters so above alleged. The applicable law is uncontroverted. Yet one will search in vain to discover, in the opinion of the Circuit Court of Appeals, any reference to the defense so tendered or any authorities to controvert the applicable law. This defense, which met the United States at the very threshold of the suit, is not mentioned in the opinion (R. 139) where the court states the three contentions for reversal that call for consideration.

The evidence fails to establish the allegation that the United States prosecutes the case for the use and benefit of its Indian wards. The "allegata and the probata" do not concur. As recently observed by this Court in *United States v. Yellow Cab Co.*, 94 L. ed, Adv. Ops. 123, decided December 5, 1949:

"the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty,

from which the Government is no more immune than others."

In closing the discussion on the real party in interest specification it should be observed that the decisons of the courts below carry no presumption of sufficiency or accuracy. The entire evidence is contained in the agreed stipulations of facts with exhibits attached thereto (R. 24 to 80).

Specification of Error II.

The court below erred in holding that the taxes in suit are rent and created a debt which the United States may recover for and on behalf of the Indian lessors.

Discussion of above specification covers Point D of Summary of Argument.

It is true that ordinarily failure to perform a covenant to pay rent creates a debt and that the lessor may sue without first paying the tax. The fundamental principle is that the tax is a lien and the lien can be foreclosed and the lessor may lose his property. Such is not the fact here. The distinction is made clear in the case of:

Lamoine Mott Estate v. Neiman (8 Cir.), 77 F. 2d 744.

This was an action by a lessor to obtain a statutory landlord's lien against assets of a bankrupt. In holding the landlord not to be entitled to the lien the Court said at page 747:

"Appellant bases its contention that the claimed items for taxes, interest, and penalties are in fact rent, and therefore within the terms of the lien stat-

> utes, upon the ground that the payment of such charges was a part of the consideration to be rendered for the use of the premises. * * * But, in construing this lease contract, in conjunction with the express terms of the Iowa statutes, *we feel compelled to follow the general rule that there is a clear distinction between taxes and rent in common usage*, and that the term 'rent' may not be construed as to include taxes, 'in the absence of a clear intention of the parties to that effect expressed in the lease.' " (Italics supplied.)

After citation of authority, the Court continues:

> "In that case we thought that the provision in the lease for the payment of the taxes by the lessee 'as an additional consideration for the leasing of said premises' revealed 'an intention of the parties to treat such taxes as a part of the rental for the property.' The lease under consideration not only has no such provision, but, on the contrary, contains language which expressly defines and limits the term 'rent' as used therein, and excludes the construction for which appellant contends."

Paragraph III of the lease there under consideration by the court provided for taxes as follows:

> "The lessee shall in all instances in addition to said stipulated rental, pay all taxes * * * which are to be assessed against or levied upon said real estate or improvements thereon during the term of the lease."

In the case of *Miles Corporation v. Lindel* (8 Cir.), 107 F. 2d 729, the Court held taxes to be rental under the facts presented. And the Court said of the Lamoine Mott Estate case, supra:

> "We there distinguished the foregoing provision from the provision quoted above in the Britton case. We pointed out that the covenant to pay taxes 'in

addition to (the) stipulated rental' is wholly inconsistent with the view that taxes were included generally within the term 'rent'. That distinction does not apply here. *In this case the covenant is to pay taxes as 'additional rental', not 'in addition to the stipulated* rental' * * *." (Italics supplied.)

We submit that the evidence in the instant case, reviewed above in this brief, establishes that the covenant here was to pay taxes *in addition* to the stipulated rental, not as additional rental, and the rule of the Lamoine Mott Estate case, supra, applies.

In 51 C. J. S., Landlord and Tenant, p. 1054, the rule is stated:

"As a general rule the intent of the parties, as gathered from a construction of the lease as a whole, determines and governs the taxes for which the lessee may be held liable under an agreement to pay taxes or assessments. * * * *In the case of doubt the tax clause should be construed most strongly against the lessor and most favorably to the lessee.*" (Italics supplied.)

Plaintiff Shows No Damage.

It is to be always borne in mind that in the instant case the landlord's position is that of not having paid the taxes and of not being obligated to pay the taxes, for the taxes are not a lien upon these restricted lands. Nonpayment of the taxes has, therefore, inflicted no damage upon the landlord.

At page 1068 of Vol. 51, C. J. S., is stated:

"In an action for a lessee's breach of a covenant to pay taxes the lessor is entitled to recover such damages as he sustained because of the breach. In order, however, for damage to be allowable, they

> must be ascertainable with reasonable certainty. The measure of damages has been held to be the amount of such tax or assessment with interest thereon * * *. *However, it has also been held that it cannot be said as a matter of law, that where the lessor has not himself paid the taxes, the damages incurred by him through failure of the lessee to pay them is the amount of the taxes assessed.*" (Italics supplied.)

In the case of *In Re Associated Trust Hotels,* 228 F. 767, a proceeding in bankruptcy, the Court states at page 770:

> "As the Lenox Company has not paid the interest and taxes on which its proof of claim is based, its exact right is, not to have those amounts paid to it, but to be repaid such damages as it has sustained through the bankrupt's failure to pay them as it agreed to do."

Syllabus 2 of the case is as follows:

> "Where a lessor had not paid interest and taxes, which the lessee agreed, but failed, to pay, it was entitled only to such damages as it sustained through the lessee's failure to pay, and while this would ordinarily be the amounts agreed to be paid, it could not be held as a matter of law that the damages were necessarily those amounts."

And so in the instant cases, while plaintiff alleges a breach of contract, the evidence does not show damage for which plaintiff can obtain recovery. Neither plaintiff nor its ward has paid the taxes; neither plaintiff nor its ward is obligated to pay the taxes; there can be no lien or charge upon the Indians' lands; the Indian owners have been paid in full the amounts due them as agreed upon, neither plaintiff nor its wards has, therefore, suffered compensable damage (Stipulation 4, 8; R. 25).

It is elementary that a right of action depends on the concurrence of wrong and damage. *Hardyman v. Collins,* 80 F. Supp. 501.

Specification of Error III.

The court below erred in failing to sustain the defense that the method prescribed by the Brown-Stephens Act for collection and discharge of the taxes is exclusive.

The Act specifically provides for the assessment of taxes, for their collection and for their discharge if unpaid. It is a special statute creating a new right and prescribing the remedy. The rule is stated in 1 Corpus Juris, Actions, Sec. 102:

> "Where a statute creates a new right and also provides a remedy for its enforcement, it is ordinarily held that such remedy is exclusive. This rule seems to have been first laid down with reference to remedies under criminal and penal statutes, but it applies equally to civil actions of a personal nature; and where the statute providing such a remedy confers jurisdiction thereof upon a particular court or tribunal, such jurisdiction, as well as the remedy, is exclusive."

The foregoing rule has been reaffirmed by the Supreme Court in the case of *Bruce's Juices v. American Can Co.,* 330 U. S. 743, 755; 91 L. Ed. 1219, 1228. The Court stated, p. 755 U. S.:

> "The Court * * * has reaffirmed the 'doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." ' D. R. Wilder Mfg. Co. v. Corn Products Ref. Co., 236 U. S. 165, 174, 175, 59 L. ed. 520, 525, 526, 35 S. Ct. 398, Ann.

Cas. 1916A, 118; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431."

Bowles v. Warner Holding Co. (C. C. A. 8), 151 F. 2d 529:

> "It is well settled that where a statute creates a right and provides a special remedy, that remedy is exclusive."

Further in the opinion the Court quotes 50 American Jurisprudence, Statutes, Sec. 596, pages 593, 594 as follows:

> "It is an established principle, that if a statute creating a new right or cause of action where none existed before, also provides an adequate remedy for the enforcement of the right created, and the statutory remedy is not by its terms cumulative, the remedy thus prescribed is exclusive. In such case such remedy must be pursued in the enforcement of the right to the exclusion of any other remedy."

Progressive Miners of America v. Peabody Coal Co., 7 Fed. Supp. 340:

> "Syl. 3. One seeking or relying on a new right, given by statute declaring remedy, is confined to such remedy."

In the body of the opinion the Court said:

> "The rule is that, where a statute gives a new right and declares the remedy, anyone seeking or relying on the right so given is confined for his remedy to that which is prescribed in the statute. 1 C. J. 988-990; Globe Newspaper Co. v. Walker, 210 U. S. 356, 28 S. Ct. 726, 52 L. Ed. 1096; French v. Willer, 126 Ill. 611, 18 N. E. 811, 2 L. R. A. 717, 9 Am. St. Rep. 651; D. R. Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165, 35 S. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118."

Stanley, et al. v. Peabody Coal Co., 5 Fed. Supp. 612:

> "Where a statute creates a new offense and denounces a penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute provides."

Carmody v. L. L. Coryell Oil Co., 133 Neb. 661, 276 N. W. 383:

> "Plaintiff cannot recover in this action for another reason. It is a settled rule of law that, where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U. S. 165, 59 L. Ed. 520."

Coryells had signed the Blue Eagle contract for the benefit of their employees. The employees sued as third party beneficiaries. The Nebraska court denied recovery for the reason stated.

The claims of the United States are bottomed upon a new right created by provisions of the Brown-Stephens Act. This can not be denied, for in the absence of the statute there would have been no taxes and no provision in the leases relative to taxes. By its terms this act purported to give to the various governmental subdivisions of the State of Nebraska a limited right to assess and levy taxes upon these lands. This right did not previously exist. The usual incidents of taxation and the methods of collection were, however, specifically excepted from operation of this new right of taxation. Instead, there was provided a specific mode of procedure to be followed and adhered to in the collection of any taxes imposed.

The statutory remedy thus established was not pursued (Stipulation 9; R. 26). Instead, lease agreements were made whereby payment of taxes arising from the Brown-Stephens Act were to be made to the Treasurer of the County by the lessee. United States sues upon these contracts for the amounts of the taxes so assessed. Collection of the taxes assessed pursuant to the Brown-Stephens Act is sought by resort to a remedy not made available by the provisions of the statute.

Respondent is, therefore, in the anomalous position of relying on the Brown-Stephens Act for the assessment and levy of the sums of taxes claimed, and at the same time rejecting the exclusive provisions of the Act for collection of said sums.

The opinion below, while permitting recovery on contract, yet finally admits (R. 148) that "the recovery was dependent on the Act for its form and content."

It is believed that the foregoing facts and authorities warrant more than the "passing comment" bestowed upon same by the Court of Appeals (R. 144). No authority is there cited in support of the statement that the rule applies only to actions of the tax-collecting authorities.

Specification of Error IV.

The court below erred in failing to hold that the Indian trust lands are immune from taxation. Point E of Summary of Argument.

The Court may grant certiorari herein and may reverse the decisions below and direct dismissal of the action without the necessity to pass upon the foregoing point. Nevertheless the specification is sound as applied

to the facts and the Brown-Stephens Act. The Act authorizes the Secretary, under certain circumstances, to use funds of Indian allottees, arising from the taxed lands, to pay the taxes. This is contrary to the vested rights of the Indian. **There is no evidence in the record that any Indian allottee ever asked or consented or wished to have any of his trust funds used to pay taxes.** The suggestion in the opinion below (R. 146-7) that the payment of taxes would be for the welfare and advantage of the Indian and that he has the right to approve payment, out of his own funds, requires considerable reflection on the nature of "genus homo," red or white. The Allotment Act provides:

25 U. S. C. A. 348:

> "which patents shall be of legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * * and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs aforesaid, in fee, discharged of said trust *and free of all charge or incumbrance whatsoever* (Italics supplied); Provided, that the President of the United States may in any case in his discretion extend the period."

Choate v. Trapp, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941:

> "The provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. * * * It was a vested property right which could not be abrogated by statute."

Mahnomen County v. United States (C. C. A. 8), 131 F. 2d 936:

> "*It is also settled that Congress itself may not by legislative fiat deprive the Indian of the tax exemption* inuring to him under the obligation to convey to him free of incumbrance. It is held that he has a vested right to the exemption." (Italics supplied.)

Glacier County, Montana v. United States (C. C. A. 9), 99 F. 2d 733:

> "A grant of immunity from taxation during the trust period is implied from the Allotment Act and the terms of the trust patents; and this immunity is a vested right of which the Indian may not be deprived without his consent."

United States v. Nez Perce County, Idaho (C. C. A. 9), 95 F. 2d 232:

> "*The Allotment Act, as well as the trust patent, by plain implication granted the Indian immunity from taxation during the trust period or any extension of it,* and he had the right finally to receive his lands 'free of all charge or incumbrance whatsoever.' The authorities are uniform to the effect that this right of exemption is a vested right, as much a part of the grant as the land itself, * * * ." (Italics supplied.)

Citation of additional authorities would be superfluous. The plain fact is that under the terms of the Brown-Stephens Act the Secretary is authorized to pay the taxes from any funds in his hands belonging to the Indian allottee and arising from the rentals thereof. This is in derogation of the covenant in the Allotment Act supra that the United States will hold the land, during the trust period "for the sole use and benefit of the Indian to whom such allotment shall have been made."

CONCLUSION

Finally, laying aside the questions of constitutionality, landlord and tenant debt, exclusive remedy and no damages, the fundamental, outstanding, inescapable error appears: Neither the United States nor the Indian wards are the real party in interest. Thurston County is the real party in interest. The sovereign majesty of the United States has been used to avoid defenses otherwise available against the real party in interest. Petitioners believe this Court will not sanction such misuse of the judicial process.

A sincere effort has been made, within the limited space available, to demonstrate that this case calls for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decison below.

Dated at Omaha, Nebraska, October 28, 1950.

GEORGE M. TUNISON,
Counsel for Petitioners.

RICHARD C. PECK,
Of Counsel.

APPENDIX

BROWN-STEPHENS ACT

Act of December 30, 1916 (S. 6116) 39 Stat., 865, Chap. 10—An Act Providing for the taxation of the lands of the Winnebago Indians and the Omaha Indians in the State of Nebraska.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the lands in the State of Nebraska belonging to the members of the tribe of Winnebago Indians held under trust patents of allotments, and upon which the twenty-five-year trust period shall have expired, or shall expire, and which trust period shall have been or shall be extended as provided by law, shall be, and the same are hereby, made subject to appraisement and assessment for the purpose of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska now in force or to be hereafter enacted.

"Sec. 2. That all of the lands in the State of Nebraska belonging to the members of the tribe of Omaha Indians now held under trust patents of allotments issued in eighteen hundred and eighty-five or subsequent thereto, and upon which the twenty-five-year trust period shall have expired, and which trust period shall have been extended, as provided by law, shall be, and the same are hereby, made subject to appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and State purposes, as provided by the laws of the State of Nebraska now in force or to be hereafter enacted: Provided,

That any of the lands described in section one and section two of this Act, so long as the same shall be held under trust patents, shall not be subject to levy and tax sale, as provided under the laws of the State of Nebraska, for the collection of such taxes; but if such tax shall not be paid within one year after the same shall become due and payable, as provided by the laws of the State of Nebraska, then the list of such unpaid and delinquent taxes on the lands of the Winnebago Indians and Omaha Indians, as above provided, shall be certified by the county treasurer of the county in which such lands are situated to the Secretary of the Interior, who shall be authorized to pay the same from any funds belonging to the Indian allottees owning such lands so taxed and arising from the rentals thereof or under his control; and in the event that no such funds shall be in the possession or under the control of the Secretary of the Interior, he shall certify that fact to the said county treasurer, which certificate shall operate as a full release and discharge of the tax assessed against the land of the Indian so without funds."

Approved, December 30, 1916.